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La CEDU su prelievo di campione di DNA
(CEDU, sez. IV, sent. 14 aprile 2020, ric. n. 75229/10)

La Corte Edu si pronuncia sul caso riguardante il sig. Dragan Petrović, il quale, nell'ambito di una indagine per omicidio, aveva subito da parte della polizia una perquisizione del proprio appartamento ed il prelievo forzoso di un campione di DNA da saliva.
I Giudici di Strasburgo hanno riscontrato, innanzitutto, che il mandato di perquisizione era stato sufficientemente specifico ed era stato assistito da garanzie adeguate ed efficaci contro eventuali arbitrii durante la ricerca stessa: conferma di ciò si trae dalla circostanza che sia il ricorrente, che il suo avvocato, che il proprietario dell'appartamento erano stati presenti durante la perquisizione stessa.
Al contrario, si è ritenuto che il prelievo del campione di DNA da saliva non fosse avvenuto "secondo la legge", ai sensi dell'art. 8 Cedu. La misura, invero, era stata eseguita ai sensi di un precedente codice di procedura penale, che autorizzava solo il prelievo di campioni di sangue, o l'esecuzione di "altre procedure mediche". Tale codice era stato aggiornato nel 2011, con introduzione di nuove garanzie correlate ai tamponi di DNA dalla bocca (riferimento specifico alla possibilità di assunzione di tamponi orali, necessità di far eseguire il prelievo da un esperto, limitazione delle categorie di persone sottoponibili a tamponi anche in mancanza di consenso). Tale novella legislativa, secondo la Corte, porterebbe con sé un implicito riconoscimento della mancata previsione di tale misura nella precedente versione del testo normativo e, comunque, della necessità di una regolamentazione più rigorosa in questo settore.
Di qui la dichiarazione, all'unanimità, della mancata violazione dell'art. 8 (diritto al rispetto della vita privata) in relazione alla perquisizione eseguita da parte della polizia nell'appartamento del ricorrente; con sei voti contro uno, invece, è stata riconosciuta la violazione del medesimo art. 8 in relazione al prelievo di un campione di DNA da saliva.

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EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FOURTH SECTION

CASE OF DRAGAN PETROVIĆ v. SERBIA

(*Application no. 75229/10*)

JUDGMENT
STRASBOURG
14 April 2020

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Dragan Petrović v. Serbia,

The European Court of Human Rights (Fourth Section), sitting as a Chamber composed of:
Jon Fridrik Kjølbro, *President*,
Faris Vehabović,
Iulia Antoanella Motoc,
Branko Lubarda,
Carlo Ranzoni,
Stéphanie Mourou-Vikström,
Jolien Schukking, *judges*,
and Andrea Tamietti, *Section Registrar*,
Having regard to:
the application against Serbia lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Serbian national, Mr Dragan Petrović ("the applicant"), on 6 December 2010;
the decision to give notice of the application to the Serbian Government ("the Government");
the parties' observations;
Having deliberated in private on 28 January and 3 March 2020,
Delivers the following judgment, which was adopted on the latter date:

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Art 8 • Respect for private life • Taking of a DNA sample from the applicant's saliva in a preliminary investigation • Applicant's approval obtained by threat of force • No foreseeability of the law • No reference to any specific legal provisions in the order authorising the police to take the sample • No specific reference in the law to the taking of a DNA sample • Need for tighter regulation demonstrated by more detailed provisions in recent legislation • Respect for home • Search of applicant's home based on adequate and sufficient reasons and accompanied by effective safeguards

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INTRODUCTION

The application, lodged under Article 8 of the Convention, concerns the search of the applicant's flat and the taking of a DNA sample from him, both in a criminal-justice context.

THE FACTS

1. The applicant was born in 1985 and lives in Subotica. He was represented by Mr V. Juhas Đurić, a lawyer practising in the same town.
2. The Government were represented by their former Agent, Ms V. Rodić.
3. The facts of the case, as submitted by the parties, may be summarised as follows.

A. The preliminary criminal investigation

4. On 16 July 2008 a certain Mr A informed the Subotica police department (Policijska uprava u Subotici) that he had heard from a certain Ms B that she and the applicant had taken part in a crime involving the severe beating of an elderly man, Mr C, who had died as a possible consequence thereof.
5. On 22 July 2008 the Subotica police department informed the investigating judge (istražni sudija) of the Subotica District Court (Okružni sud u Subotici), via the district public prosecutor's office in Subotica (Okružno javno tužilastvo u Subotici), that it had information to the effect that the applicant and Ms B may have taken part in the murder of Mr C. Therefore, the Subotica police department proposed that the flats in which the applicant and Ms B lived, respectively, be searched with a view to finding: (i) the "objects taken" following the murder, notably a black leather jacket; and (ii) their shoes, in order to compare them to the footprints found at the scene of the crime.
6. On the same day, but by means of a separate submission, the Subotica police department informed the district public prosecutor's office that, according to their information, the applicant and Ms B may have taken part in the murder of Mr C. It therefore urged the district public prosecutor's office to formally request the investigating judge to order that DNA samples be taken from them for the purposes of comparing those samples with the biological traces found at the scene of the crime.
7. On 29 July 2008, referring to Article 239 of the Code of Criminal Procedure (see paragraph 27 below), the district public prosecutor's office requested the investigating judge to order that the flats in which the applicant and Ms B lived, respectively, be searched and that a sample of their DNA be taken, together with a DNA sample from a certain Mr D. The reason given was to clarify the relevant circumstances surrounding the murder of Mr C. No suspect, however, was formally identified by name in the district public prosecutor's request.
8. On 29 July 2008 the investigating judge ordered that the flat in which the applicant lived be searched. The order stated that it had been issued at the request of officers of the Subotica police department who maintained that a search would "probably" (verovatno) result in a seizure of evidence relevant to the investigation into the murder of Mr C. The investigating judge accepted this reasoning and specified that the search should focus on "objects taken" following the murder, notably a "black leather jacket", as well as on "shoes and other objects" which could be connected to the crime in question. The order noted that in carrying out the search the officers were to comply with the relevant provision of the Code of Criminal Procedure. Lastly, by means of a separate decision of the same date and giving the same reasons, the investigating judge ordered that the flat in which Ms B lived also be searched.
9. On the same day, but by means of a separate decision, the investigating judge ordered that a sample of the applicant's saliva be taken for the purposes of a DNA analysis. The judge authorised

the police to take this sample, or alternatively a sample of the applicant's blood, by force should the applicant resist, with the assistance of medical professionals. The reasoning of this order stated that a DNA test was required in order to compare the DNA data found at the scene of the crime, namely the murder of Mr C, with the applicant's own DNA profile. The same order, in respect of the same crime and for the same reasons, was also to be applied in respect of Mr D.

10. On 30 July 2008 and in the presence of his lawyer the applicant agreed to give a sample of his saliva to the officers. It would appear, however, that no official record of how the order was carried out was ever produced by the police.

11. On the same day the officers also searched the flat in which the applicant lived and seized two handguns together with some ammunition. The police issued a certificate to this effect, which contained the date of the search and the signature of one of the officers involved, but did not contain a complete or fully legible case file number. The applicant's lawyer also signed the document, but the applicant himself refused to do so.

12. On the same occasion, the police prepared the official record of the search-and-seizure operation. This document, which was dated and signed by one witness, one of the two officers involved, the official record-keeper and the applicant's lawyer, but again not by the applicant himself, noted that the applicant had denied knowing anything about the handguns found in the flat and that his lawyer had furthermore objected that the search warrant itself had been vague. The owner of the flat which was searched, a person possibly related to the applicant, was mentioned in the record as having been present, but the record did not contain her signature.

13. On 13 August 2008 the Subotica police department informed the investigating judge that it had decided to press charges against the applicant for illegal possession of firearms.

14. On 11 September 2008 the investigating judge informed the district public prosecutor's office that in their report of 28 August 2008 forensic experts had found no match between the applicant's DNA sample and the biological traces found at the scene of the crime.

B. The proceedings before the Constitutional Court

15. On 4 August 2008 the applicant lodged an appeal (ustavna žalba) with the Constitutional Court (Ustavni sud) alleging, inter alia, a violation of his right to respect for his home and his private life. In so doing the applicant referred, inter alia, to Article 8 of the Convention and Articles 25 and 40 of the Constitution (see paragraphs 20 and 21 below).

16. On 14 October 2010 the Constitutional Court dismissed (odbio) the applicant's appeal on the merits, having examined his search-related complaint under Article 40 of the Constitution and his DNA-related complaint under Article 25 thereof. In particular, the court stated that the investigating judge and the police had acted in accordance with the law. The probability that relevant evidence would be uncovered justified the search and the taking of the DNA sample from the applicant. Furthermore, while noting that only one witness had been present during the search, the Constitutional Court found that the reasons given by the investigating judge, in both regards, had been adequate and that the search warrant had been sufficiently precise. Lastly, the court pointed out that the applicant had given the DNA sample of his own free will (see paragraph 10 above), but it made no reference to Article 131 of the Code of Criminal Procedure (see paragraph 26 below).

17. The applicant was served with the Constitutional Court's decision on 2 December 2010.

RELEVANT LEGAL FRAMEWORK

A. The Constitution of the Republic of Serbia (Ustav Republike Srbije; published in the Official Gazette of the Republic of Serbia – OG RS – no. 98⁄06)

18. Article 16 § 2 provides, inter alia, that "ratified international treaties are an integral part of the [Serbian] legal system" and "shall be directly applicable".
19. Article 18 provides, inter alia, that "the Constitution shall guarantee ... the direct implementation of human and minority rights secured by the generally accepted rules of international law ... [and] ... ratified international treaties". It further provides that "provisions on human and minority rights shall be interpreted ... in accordance with valid international standards on human and minority rights, as well as the practice of international institutions which supervise their implementation".
20. Article 25 provides that "physical and mental integrity ... [shall be] ... inviolable" and that no one "may be subjected to torture, inhuman or degrading treatment or punishment, or subjected to medical and other experiments without their free consent".
21. Article 40 provides, inter alia, that a person's home is inviolable. No one may, in the absence of a written court order, enter another person's home or other premises against that person's will or conduct a search thereof. The person concerned has the right to be present during the search, together with two other witnesses of legal age, and is also entitled to the presence of a lawyer if he or she so chooses. Entering a person's home or other premises, and, in exceptional cases, conducting a search without witnesses, is allowed without a court order only if this is necessary for the purposes of the immediate arrest of the perpetrator of a criminal offence or in order to eliminate a direct and grave danger to persons or property, in accordance with the law.
22. Article 170 provides that a "constitutional appeal may be lodged against individual decisions or actions of State bodies or organisations exercising delegated public powers which violate or deny human or minority rights and freedoms guaranteed by the Constitution, if other legal remedies for their protection have already been exhausted or have not been prescribed".

B. The 2001 Code of Criminal Procedure (Zakonik o krivičnom postupku, published in the Official Gazette of the Federal Republic of Yugoslavia – OG FRY – no. 70⁄01, amendments published in OG FRY no. 68⁄02 and in OG RS nos. 58⁄04, 85⁄05, 115⁄05 and 49⁄07)

23. Article 77 § 1 provided, inter alia, that a search of a suspect's home or of his or her other premises, as well as those of other persons, could be carried out if it was "probable" (verovatno) that this measure would result in the uncovering of "traces of the criminal offence" in question or in the seizure of evidence "of importance" to the criminal investigation.
24. Article 78 §§ 1 and 2 provided, inter alia, that a search could only be ordered by a reasoned decision issued by a court of law. The person concerned was also entitled to the presence of his or her counsel. A search warrant was to be served before the commencement of the operation on the person whose premises were to be searched. Before the search, the person concerned was also to be given an opportunity to surrender voluntarily the objects referred to in the search warrant.

25. Article 79 §§ 1, 3, 7 and 8 provided, inter alia, that "the holder" of the premises in question was to be "invited to attend the search" while the search itself was to be carried out in the presence of two witnesses of legal age. Before "the commencement of the search the witnesses [were] to be instructed to observe the conduct of the search" and informed "that they [were] entitled" to enter their objections in the official record of the operation if they believed that its content was not accurate. Searches were to be "conducted with care and respect for the dignity of the person concerned and his or her right to privacy" and without any unnecessary disruption. The record of the search was to be signed by the person concerned and all other persons whose presence was mandatory. Only objects and documents connected to the purpose of the search could be seized. These were also to be entered in the official search record and accurately identified. Finally, the same information was to be included in a separate receipt which was to be served on the person from whom the objects and/or documents in question had been taken.
26. Article 131 §§ 2 and 3 provided, inter alia, that a court of law could order that a blood sample be taken from, or "other medical procedures" be undertaken in respect of, any given person if this was deemed medically necessary in order to establish facts "of importance" to the criminal investigation. Such procedures could be carried out forcibly, where necessary, provided that this did not entail any risk to the health of the person in question.
27. Article 239 provided that where the perpetrator of a crime remained unknown the public prosecutor was entitled to petition the investigating judge to undertake specific measures aimed at the establishment of the person's identity prior to deciding whether or not to seek the institution of a formal judicial investigation. An official record of how any such measures had been carried out was to be forwarded to the competent public prosecutor.
28. This Code was subsequently amended in 2009 and 2010.

C. The 2011 Code of Criminal Procedure (Zakonik o krivičnom postupku, published in OG RS no. 72/11, amendments published in OG RS nos. 101/11, 121/12, 32/13, 45/13, 55/14 i 35/19)

29. This Code repealed and replaced the 2001 Code of Criminal Procedure in January 2012 or October 2013, depending on the type of criminal proceedings in question.
30. Article 140 §§ 1, 3 and 4 of the new Code provides, inter alia, that, "with the aim of establishing the facts in the proceedings ... buccal swab samples ..." may be taken from a suspect even in the absence of his or her consent. In order to "eliminate a suspicion of being connected to a criminal offence", buccal swab samples may also be taken "from a victim or another person found at the scene of the crime", again even in the absence of their consent. The above procedural steps must be carried out by an expert and based on an order issued by a public prosecutor or a court of law.
31. Article 141 §§ 1 and 2 provides, inter alia, that the "obtaining of samples of biological origin" may not be undertaken if this would "cause harm to the health" of the person concerned.
32. Article 142 § 1 provides, inter alia, that if it is "necessary for the identification of the perpetrator of a criminal offence or the establishment of other facts in the proceedings", a public prosecutor or a court of law may order the taking of samples for the purposes of "forensic genetic analysis": (i) from the scene of the crime or another location where traces of the crime were found; (ii) from the defendant and the victim, under the conditions stipulated in Article 141 (see paragraph 31 above);

and (iii) from other persons if there are one or more factors that connect them to the criminal offence at issue.

D. The legislation on personal data protection

33. In 1998 the Parliament of the Federal Republic of Yugoslavia adopted the Personal Data Protection Act (Zakon o zaštiti podataka o ličnosti, published in OG FRY no. 24⁄98, with amendments published in OG FRY no. 26/98).
34. In 2008 the Serbian Parliament adopted a new piece of legislation also called the Personal Data Protection Act (Zakon o zaštiti podataka o ličnosti, published in OG RS no. 97⁄08, with amendments published in OG RS nos. 104⁄09, 68⁄12 and 107⁄12).This Act repealed and replaced the 1998 Act.
35. Both Acts regulated various personal data protection issues, including the retention, use, processing and deletion of personal data. They also provided for an administrative and judicial mechanism to be made available to persons who believed that their rights had been violated.
36. The 2008 Act was itself repealed and replaced by other legislation enacted in 2018.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

37. The applicant complained that the search of his residence had been carried out in breach of his right to respect for his "home" and his "private life" as secured under Article 8 of the Convention. The applicant further complained that the taking of a DNA sample from him had also violated his right to respect for his "private life" within the meaning of the same provision.
38. Article 8 of the Convention reads as follows:

"1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

A. Admissibility

1. The parties' observations

(a) The Government

39. The Government noted that the Constitutional Court, in its decision of 14 October 2010, had examined the applicant's DNA-related complaint under Article 25 of the Constitution, a provision which focused on the prohibition of torture and inhuman or degrading treatment (see paragraph 20 above). In those very specific circumstances, a constitutional appeal could not be deemed to amount to an effective domestic remedy in respect of the applicant's complaint concerning his "private life".

In particular, the Constitutional Court could only examine alleged "violations of the right[s] guaranteed by the Constitution". This part of the application, according to the Government, had therefore been lodged out of time, that is, more than six months after the impugned taking of a DNA sample from the applicant on 30 July 2008 (see paragraph 10 above).

40. In addition or in the alternative, and again with regard to the DNA-related complaint only, the Government submitted that the applicant should have made use of the effective domestic remedies provided for in the relevant national data protection legislation (see paragraphs 33-35 above). Since, however, he had failed to do so, it followed that his complaint was to be rejected on the grounds of non-exhaustion.

(b) The applicant

41. The applicant submitted that Article 8 of the Convention was directly applicable in the Serbian legal system, on the basis of Article 18 of the Constitution (see paragraph 19 above). Hence, his DNA-related complaint could and should have been considered by the Constitutional Court under both Article 8 of the Convention and Article 25 of the Constitution (see paragraph 20 above). In any event the Constitutional Court had examined his complaint on the merits and dismissed it for the substantive reasons stated in paragraph 16 above. In those circumstances the constitutional appeal was clearly a remedy which it had been appropriate for the applicant to pursue, as it was generally capable of affording adequate redress even though in his particular case it had not done so. Ultimately, the application itself was lodged with the Court within a period of six months following the date on which the applicant received notice of the Constitutional Court's decision in his case (see paragraph 17 above).

42. The applicant further maintained that no possible remedies based on the relevant data protection legislation (see paragraphs 33-35 above) would have been effective. Notably, the present case concerned the taking of a DNA sample from the applicant in a criminal-justice context, not "obtaining information" about his DNA sample or its "destruction". Moreover, and in any event, the ordinary civil courts could not, under Serbian law, find a criminal court decision unlawful or in breach of the Convention. The Constitutional Court, however, could do so and it was for that reason that the applicant had lodged a constitutional appeal.

2. The Court's assessment

(a) General principles

43. The Court reiterates that the rule of exhaustion of domestic remedies referred to in Article 35 of the Convention obliges those seeking to bring a case against a State before the Court to use first the remedies provided by the national legal system. Consequently, States are dispensed from answering for their acts before an international body before they have had an opportunity to put matters right domestically (see Vučković and Others v. Serbia (preliminary objection) [GC], nos. 17153/11 and 29 others, § 70, 25 March 2014).

44. As regards legal systems which provide constitutional protection for fundamental human rights and freedoms, such as the one in Serbia, it is incumbent on the aggrieved individual to test the extent

of that protection (see, inter alia, Vinčić and Others v. Serbia, nos. 44698/06 and 30 others, § 51, 1 December 2009).

45. An applicant's failure to make use of an available domestic remedy or to make proper use of it (that is to say by bringing a complaint at least in substance and in compliance with the formal requirements and time-limits laid down in domestic law) will result in an application being declared inadmissible before this Court (see Gäfgen v. Germany [GC], no. 22978/05, § 142, ECHR 2010; see also Vučković, cited above, § 72).

46. The Court has, however, also frequently underlined the need to apply the exhaustion rule with some degree of flexibility and without excessive formalism (see Ringeisen v. Austria, 16 July 1971, § 89, Series A no. 13, and Akdivar and Others v. Turkey, 16 September 1996, § 69, Reports of Judgments and Decisions 1996-IV).

47. It would, for example, be unduly formalistic to require applicants to exercise a remedy which even the highest court of their country would not oblige them to exhaust (see D.H. and Others v. the Czech Republic [GC], no. 57325/00, §§ 117 and 118, ECHR 2007-IV).

48. Also, where more than one potentially effective remedy is available, the applicant is only required to use one remedy of his or her own choosing (see, among many other authorities, Micallef v. Malta [GC], no. 17056/06, § 58, ECHR 2009; Nada v. Switzerland [GC], no. 10593/08, § 142, ECHR 2012; Göthlin v. Sweden, no. 8307/11, § 45, 16 October 2014; and O'Keeffe v. Ireland [GC], no. 35810/09, §§ 109-111, ECHR 2014 (extracts)).

49. Concerning the timeliness issue, the Court reiterates that the object of the six-month time-limit under Article 35 § 1 is to promote legal certainty, by ensuring that cases raising issues under the Convention are dealt with in a reasonable time and that past decisions are not continually open to challenge. It marks out the temporal limits of supervision carried out by the Court and signals to both individuals and State authorities the period beyond which such supervision is no longer possible (see, amongst other authorities, Walker v. the United Kingdom (dec.), no. 34979/97, ECHR 2000-I).

50. As a rule, an application must be introduced within six months of the date of the "final decision" in the chain of domestic remedies which have to be exhausted, or where there are no such remedies, from the date of the act complained of, or knowledge thereof. An exception may be made to the six-month rule in the event of a continuing situation giving rise to a violation (see Nelson v. the United Kingdom, no. 74961/01, § 12, 1 April 2008).

(b) Application of these principles to the present case

(i) As regards the six-month time-limit

51. The Court recalls that it has repeatedly held that a constitutional appeal should, in principle, be considered an effective domestic remedy within the meaning of Article 35 § 1 of the Convention in respect of all applications introduced against Serbia after 7 August 2008 (see Vučković, cited above, § 84, and Vinčić, cited above, § 51). It sees no reason to depart from this practice in the present case, particularly since, as noted by the applicant (see paragraph 41 above), the Constitutional Court had examined his DNA-related complaint on its merits and dismissed it for the substantive reasons stated in paragraph 16 above.

52. Furthermore, Article 18 of the Constitution provided for "direct implementation of human ... rights secured by ... ratified international treaties" (see paragraph 19 above), which clearly applied, inter alia, to the rights enshrined in Article 8 of the Convention. The Constitutional Court could therefore have examined the applicant's complaint under this provision had it decided to do so.
53. In these circumstances, the Court is of the opinion that a constitutional appeal was an "effective remedy" within the meaning of Article 35 § 1 of the Convention and consequently one which it was appropriate for the applicant to pursue, it being understood that the effectiveness of a remedy does not depend on the certainty of a favourable outcome for the person seeking redress.
54. Since the applicant was served with the Constitutional Court's decision on 2 December 2010 (see paragraph 17 above) and lodged his application with this Court on 6 December 2010, he also complied with the six-month requirement. The Government's objection in this regard must therefore be dismissed.

(ii) As regards the non-exhaustion of domestic remedies

55. With regard to the additional admissibility issue raised by the Government, specifically the applicant's failure to make use of the remedies provided for in the relevant national data protection legislation (see paragraphs 33-35 and 40 above), the Court would note that the Constitutional Court itself did not require the applicant to exhaust the remedies referred to by the Government before ruling on the merits of his appeal (see paragraphs 16 and 47 above).
56. Furthermore, having already made use of the constitutional appeal procedure, itself an effective avenue of redress within the meaning of Article 35 of the Convention, the applicant was clearly not required to pursue yet another avenue of potential redress thereafter (see paragraph 48 above), in so far as this may implicitly have been suggested by the Government.
57. In those circumstances, the Court considers that the Government's objection to the effect that the applicant failed to exhaust domestic remedies must likewise be rejected.

(iii) As regards other grounds of inadmissibility

58. Lastly, the Court is of the opinion that the applicant's complaints under Article 8 of the Convention are neither manifestly ill-founded nor inadmissible on any other grounds listed in Article 35 of the Convention. They must therefore be declared admissible.

B. Merits

1. The parties' observations

(a) The applicant

(i) As regards the search of the flat

59. The applicant averred that the search warrant had been too vague and had lacked proper reasoning, while the search itself had been carried out and recorded in an arbitrary fashion (see, for

example, paragraph 11 above). Such a practice invited all kinds of abuse although in the present case the applicant had not "become [a] victim" of any "fabrication of evidence".

60. In his written pleadings of 21 March 2015, the applicant further stated that at the time of the search neither he nor his lawyer had been aware of the fact that he was considered a suspect in the murder investigation, since this only became apparent when the Government provided documents to that effect after the Court had given them notice of the present application (see paragraphs 4-7 above). Indeed, the search warrant itself had not mentioned the applicant as a suspect, stating only that the search could lead to important evidence in connection with the crime which was being investigated. The applicant therefore concluded that significant information had been deliberately withheld by the relevant authorities and that the search had been ordered and carried out on false pretences, being designed to find evidence against him while disguising the operation as being directed against others. In this context, the applicant also submitted that there was no indication that the investigating judge had ever talked to any of the officers personally before deciding to issue the search warrant.

61. Finally, the applicant submitted that although the Code of Criminal Procedure had required the presence of two witnesses during the search (see paragraph 25 above), only one had been present and that he had never agreed to this (see paragraph 12 above).

(ii) As regards the taking of the DNA sample

62. The applicant considered that Article 131 §§ 2 and 3 of the Code of Criminal Procedure (see paragraph 26 above) had been too vague. The reference in that provision to "other medical procedures", in particular, had been unforeseeable; for that reason, the taking of a DNA sample from the applicant could not be deemed to have been "in accordance with the law" within the meaning of Article 8 of the Convention.

63. In his written pleadings of 21 March 2015, the applicant noted that in any event, as already described above in respect of the search in question, the relevant authorities had also, at the time of the taking of the DNA sample, concealed the fact that he was considered a suspect in the murder investigation (see paragraphs 60 and 4-7 above).

64. Finally, the applicant maintained that the order of the investigating judge for a DNA sample to be taken from him had not been properly reasoned, that there had been no official record describing how the order had been carried out, and that when an individual gave something to the police under the threat of force, this could in no sense be described as a voluntary act (see paragraphs 9 and 10 above).

(b) The Government

(i) As regards the search of the flat

65. The Government fully endorsed and restated the reasoning contained in the Constitutional Court's decision of 14 October 2010 (see paragraph 16 above). They acknowledged, therefore, that there had been an interference with the applicant's right to respect for his "home", within the meaning of Article 8 of the Convention, but maintained that this interference had been in accordance

with the relevant domestic law, had pursued a legitimate aim – to uncover evidence and investigate a crime committed by an unknown perpetrator – and had also been proportionate, given the severity of the offence in question, the content and scope of the search warrant and, ultimately, the manner in which the search had been carried out.

66. The Government further noted, concerning the search itself, that neither the applicant nor his lawyer had registered any objections to the "presence of a witness" during the operation (see paragraph 12 above).

67. Finally, the Government maintained that all of the documents referred to in paragraphs 4-7 above had been contained in the relevant case files of the Subotica District Court or the Subotica district public prosecutor's office, and as such had been accessible to the applicant at the relevant time.

(ii) As regards the taking of the DNA sample

68. The Government submitted that there had been no violation of Article 8 of the Convention with regard to the applicant's DNA-related complaint. In so doing they emphasised, in particular, that the taking of a DNA sample from the applicant had been fully in accordance with Article 131 of the Code of Criminal Procedure (see paragraph 26 above).

2. The Court's assessment

(a) General principles

69. The search of an applicant's residential premises has consistently been interpreted by the Court as an interference with his or her "home" within the meaning of Article 8 § 1 of the Convention (see, for example and among many other authorities, Buck v. Germany, no. 41604/98, §§ 31 and 32, ECHR 2005-IV). The taking and retention of a DNA sample has furthermore been deemed to amount to an interference with the individual's "private life" within the meaning of the same provision (see, for example, S. and Marper v. the United Kingdom [GC], nos. 30562/04 and 30566/04, § 77, ECHR 2008, and Caruana v. Malta (dec.), no. 41079/16, § 26, 15 May 2018).

70. For an interference with an applicant's "home" or his or her "private life" to be in compliance with Article 8, however, it must be "in accordance with the law", undertaken in pursuit of a "legitimate aim", and "necessary in a democratic society" (see, for example, Paradiso and Campanelli v. Italy [GC], no. 25358/12, § 167, 24 January 2017, and Caruana, cited above, § 27).

71. The Court has held that an interference cannot be regarded as lawful unless it has some basis in domestic law. In a sphere covered by written law, the "law" is the enactment in force as interpreted by the domestic courts (see, inter alia, Société Colas Est and Others v. France, no. 37971/97, § 43, ECHR 2002-III). While the Court has the ultimate power to review compliance with domestic law, it is primarily up to the national authorities, notably the judiciary, to interpret and apply that law (see, among other authorities, Chappell v. the United Kingdom, 30 March 1989, § 54, Series A no. 152-A).

72. As regards the "legitimate aim" requirement, the aim "to uncover physical evidence that might be instrumental for [a] criminal investigation into [a] serious offenc[e]" has consistently been deemed "legitimate" by the Court since it pursues the interests of public safety and has to do with

the prevention of crime and the protection of the rights of others (see, for example, Smirnov v. Russia, no. 71362/01, § 40, 7 June 2007, and K.S. and M.S. v. Germany, no. 33696/11, § 43, 6 October 2016).

73. The notion of "necessity" implies that the interference is proportionate to the legitimate aim pursued (see, among many other authorities, Camenzind v. Switzerland, 16 December 1997, § 44, Reports 1997-VIII). Regarding, in particular, searches of premises and seizures, the Court will assess whether the reasons adduced to justify such measures were relevant and sufficient and whether the aforementioned proportionality principle has been adhered to (see, for example, K.S. and M.S. v. Germany, cited above, § 43; see also Crémieux v. France, 25 February 1993, §§ 38-40, Series A no. 256-B; Miailhe v. France (no. 1), 25 February 1993, § 36-38, Series A no. 256-C; and Buck, cited above, § 45). Concerning the latter point, the Court must first ensure that the relevant legislation and practice afford individuals adequate and effective safeguards against abuse. Secondly, it must consider the specific circumstances of each case, including but not limited to the severity of the offence in question, the manner and circumstances in which the search warrant was issued, the availability of other evidence at the time, the content and scope of the warrant in question, and the extent of possible repercussions on the reputation of the person affected by the search (see, mutatis mutandis, Chappell, cited above, § 60; Camenzind, cited above, §§ 45-46; and Buck, cited above, § 45).

(b) Application of these principles to the present case

(i) As regards the search of the applicant's flat

74. The search of the applicant's residential premises amounted to an interference with his "home" within the meaning of Article 8 of the Convention, which makes it unnecessary to determine whether it also involved his "private life" in the context of the same provision (see, for example, Buck, cited above, §§ 32 and 33). It is also clear that the search had a general basis in domestic law, as interpreted by the national courts in the present case, having, inter alia, been ordered by an investigating judge on the basis of Articles 77 § 1 and 78 of the Code of Criminal Procedure with a view to uncovering the relevant facts related to a serious crime which had already been committed (see paragraphs 23, 24 and 8 above). This is, of course, quite separate from the issue of the absence of a second witness during the search (see paragraph 25 above), a matter which should, in the Court's view, more appropriately be considered in the context of the procedural safeguards discussed below. The search in question was ordered with a view to uncovering physical evidence of a serious offence, and thus in pursuit of a "legitimate aim", namely the prevention of crime and the protection of the rights of others (see paragraph 72 above). What remains to be resolved, therefore, is whether the interference with the applicant's home was "necessary in a democratic society" within the meaning of Article 8, that is, whether the interference was proportionate to the legitimate aim pursued.

75. In this regard the Court would note, at the outset, that according to the statements referred to in paragraph 4 above there was reason to suspect that the applicant might have taken part in the murder of Mr C (see, mutatis mutandis, Posevini v. Bulgaria, no. 63638/14, § 71, 19 January 2017). The investigating judge therefore had a duty to shed light on this incident, given its particularly

serious nature, and to attempt to uncover all the relevant facts including the identity of the possible perpetrators, irrespective of whether he actually had personal contact with the police officers prior to the search warrant being issued. It is also understood that, in any event, there was never anything to suggest that the authorities themselves had tampered with or attempted to fabricate any evidence against the applicant (see paragraph 59 above), who was ultimately not even formally charged with the crime in question (see paragraph 14 above).

76. Turning to the search warrant, the Court notes that it referred to a "black leather jacket" as well as to "shoes and other objects" related to the crime being investigated (see paragraph 8 above). The police themselves had already informed the investigating judge that the seizure of the shoes was necessary in order to compare them to the footprints found at the scene of the crime, while the leather jacket was an object taken following the murder (see paragraph 5 above). The search warrant in question cannot therefore be deemed to have been vague. Specifically, quite apart from whether it might have been possible to frame the warrant in even more precise terms, it was sufficient, in the given circumstances, that its scope was limited by the objects specifically mentioned and the reference to the offence in question; this in turn circumscribed the discretion of the officers who carried out the search and authorised them to seize only the items which could be seen as being potentially connected with the alleged offence (see, mutatis mutandis, Posevini, cited above, § 72). The reasons given for the search were therefore both relevant and sufficient in the particular circumstances of the present case (see the case-law cited in paragraph 73 above).

77. Finally, concerning procedural safeguards, the Court observes that while only one rather than two witnesses were indeed present during the search, the applicant and his own lawyer were both present, as was, according to the official record of the search-and-seizure operation, the owner of the flat being searched (see paragraph 12 above). Moreover, the applicant's lawyer signed the seizure certificate and the official record of the search-and-seizure operation, and in the case of the latter raised no objections to the search procedure as such but only to the reasoning of the search warrant (see paragraphs 11 and 12 above). In fact, the witness who was present during the search likewise made no objections to the search as it was carried out. The Court is thus of the opinion that the applicant was also afforded adequate and effective safeguards against any abuse during the search itself (see the case-law cited in paragraph 73 above).

78. In view of the foregoing, the Court cannot but conclude that the interference with the applicant's "home" was "in accordance with the law", was undertaken in pursuit of a "legitimate aim", and was "necessary in a democratic society", all within the meaning of Article 8 of the Convention. In the Court's view, there has accordingly been no violation of the said provision.

(ii) As regards the taking of a DNA sample from the applicant

79. The Court considers that the taking of a DNA sample from the applicant amounted to an interference with his "private life" within the meaning of Article 8 of the Convention (see the case-law cited in paragraph 69 above). The fact that the applicant agreed to give a sample of his saliva to the police officers was, in this context, of no relevance, since he only did so under the threat that either a saliva sample or a blood sample would otherwise be taken from him by force (see paragraphs 9 and 10 above; see also, mutatis mutandis, Caruana, cited above, § 29, and, conversely,

Cakicisoy and Others v. Cyprus (dec.), no. 6523/12, §§ 50 and 51, 23 September 2014, where the Court found that there had been no interference since the applicants had signed consent forms authorising the taking of their DNA samples).

80. However, the Court is of the opinion that this interference was not "in accordance with the law" within the meaning of Article 8 § 2 of the Convention, since the domestic legal provisions in question should, inter alia, have been "foreseeable as to [their] effects" for the applicant (see, for example, Caruana, cited above § 33).

81. In particular, while it is primarily for the national authorities, notably the courts, to interpret and apply domestic law (ibid., § 33; see also the case-law cited in paragraph 71 above), the Court must note with regard to the present case that the order authorising the police to take a sample of the applicant's saliva did not refer to any specific legal provisions (see paragraph 9 above), and that Article 131 §§ 2 and 3 of the Code of Criminal Procedure itself only provided that a court could order that a blood sample be taken, or that "other medical procedures" be carried out if that was deemed medically necessary in order to establish facts "of importance" to the criminal investigation (see paragraph 26 above). Hence, there was no specific reference in Article 131 §§ 2 and 3 to the taking of a DNA sample.

82. The Court would also note in this connection that when taking the applicant's DNA sample, according to the information contained in the case file, the authorities of the respondent State failed to prepare an official record of the procedure, thus failing to comply with the requirements of Article 239 of the Code of Criminal Procedure (see paragraphs 10 and 27 above).

83. Finally, while Article 131 §§ 2 and 3 of the Code of Criminal Procedure did stipulate that the procedures referred to therein could be carried out forcibly, where necessary, only provided that this did not entail any risk to the health of the person concerned and on the basis of a court order, it did not include several other safeguards laid down, for example, in the more recent Code of Criminal Procedure adopted in 2011. In particular, the latter Code, inter alia, specifically: (i) refers to the taking of DNA samples by means of a "buccal swab"; (ii) states that the procedural steps in question have to be carried out by an expert; and (iii) limits the circle of persons from whom a buccal swab sample may be taken without their consent (see paragraphs 29-32 above). Concerning this last point, the Court would note, in particular, that Article 131 §§ 2 and 3, as in force at the relevant time, provided, inter alia, that a blood sample could be taken from, or "other medical procedures" could be undertaken in respect of, any given person if this was deemed medically necessary in order to establish facts "of importance" to the criminal investigation, thus allowing such procedures in respect of a potentially very large group of persons. Conversely, Article 140 §§ 1, 3 and 4 of the new Code of Criminal Procedure indicates that buccal swab samples may be taken only from a suspect or, in order to "eliminate a suspicion of being connected to a criminal offence", from the victim or another person found at the scene of the crime. In those circumstances, the Court considers that it would be reasonable to assume that by adopting the clearly more detailed provisions regarding the taking of DNA samples in its recent Code of Criminal Procedure, the respondent State has itself implicitly acknowledged the need for tighter regulation compared with the earlier legislation in this sphere.

84. The foregoing considerations are sufficient for the Court to conclude that the interference with the applicant's "private life" was not "in accordance with the law". This renders it unnecessary for

the Court to examine whether it was undertaken in pursuit of a "legitimate aim" and was "necessary in a democratic society", within the meaning of Article 8 of the Convention. In the Court's view, there has accordingly been a violation of the said provision.

II. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

85. In his written pleadings of 21 March 2015, submitted after the Government had been given notice of the application, the applicant also maintained that he had been denied the right to be informed promptly and in detail by the authorities of the fact that he was considered a suspect in respect of a specific criminal offence, "contrary to [the] requirements of Article 6 § 3 (a) of the Convention".
The said provision of the Convention reads as follows:

"3. Everyone charged with a criminal offence has the following minimum rights:
(a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;"

86. In so far as the applicant's submissions can be understood as amounting to a separate complaint under Article 6 of the Convention and not merely an argument in support of a violation of Article 8 thereof, the Court cannot but note that the applicant never raised this matter domestically (see paragraphs 43 above). This part of the application must therefore be rejected under Article 35 §§ 1 and 4 of the Convention for non-exhaustion of domestic remedies.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

87. Article 41 of the Convention provides:

"If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

88. The applicant claimed compensation for the non-pecuniary damage suffered. In particular, he requested: (i) 1,500 euros (EUR) with respect to the search of his residence; and (ii) EUR 1,500 euros in connection with the taking of his DNA sample.
89. The applicant's lawyer, Mr V. Juhas Đurić, stated that it was the applicant's wish that any compensation awarded to him be paid directly into his lawyer's bank account. Mr Juhas Đurić would then transfer the funds or otherwise arrange payment to the applicant personally.
90. The Government contested these claims.
91. The Court considers that the applicant has certainly suffered some non-pecuniary damage. Having regard to the nature of the violation of Article 8 of the Convention established in the present case concerning the taking of a DNA sample from the applicant, and making its assessment on an equitable basis as required by Article 41 of the Convention, the Court awards the sum of EUR 1,500 to the applicant personally.

92. It is further noted, in this context, that the Court has not been provided with any form of authorisation signed by the applicant to the effect that any compensation awarded to him should instead be paid to Mr Juhas Đurić directly. The request for the award to be paid into the bank account of the applicant's lawyer must therefore be rejected (compare and contrast with, for example, Hajnal v. Serbia, no. 36937/06, § 148, 19 June 2012, and Lakatoš and Others v. Serbia, no. 3363/08, § 118, 7 January 2014).

B. Costs and expenses

93. The applicant also claimed EUR 1,375 for the costs and expenses incurred domestically and EUR 750 for those incurred before the Court.
94. The applicant's lawyer, Mr Juhas Đurić stated that it was the applicant's wish that any costs and expenses awarded to him be paid directly into his lawyer's account. Mr Juhas Đurić would then transfer the funds or otherwise arrange payment to the applicant personally.
95. The Government contested those claims.
96. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these were actually and necessarily incurred and are reasonable as to their quantum. In the present case, regard being had to the documents submitted by the parties and the above criteria, the Court considers it reasonable to award the sum of EUR 1,200 to the applicant personally, covering costs under all heads.
97. It is further noted, in this context, that while the Court has been provided with a specification concerning the legal work done by Mr Juhas Đurić on the applicant's case, there is no direct authorisation by the applicant to the effect that any costs and expenses awarded to him should be paid to Mr Juhas Đurić personally. The request for payment to be made to the applicant's lawyer must therefore be rejected (compare and contrast with, for example, Hajnal, cited above, § 153, and Lakatoš, cited above, § 124).

C. Default interest

98. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT

1. Declares, unanimously, the applicant's complaints under Article 8 of the Convention admissible and the remainder of the application inadmissible;
2. Holds, unanimously, that there has been no violation of Article 8 of the Convention as regards the search of the applicant's home;
3. Holds, by six votes to one, that there has been a violation of Article 8 of the Convention as regards the taking of a DNA sample from the applicant;
4. Holds, by six votes to one,

(a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts, to be converted into the currency of the respondent State at the rate applicable at the date of settlement:

(i) EUR 1,500 (one thousand five hundred euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
(ii) EUR 1,200 (one thousand two hundred euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;

(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

5. Dismisses, unanimously, the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 14 April 2020, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Andrea Tamietti — Registrar
Jon Fridrik Kjølbro — President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinion of Judge S. Mourou-Vikström is annexed to this judgment.

JFK
ANT

DISSENTING OPINION OF JUDGE MOUROU-VIKSTRÖM

(Translation)

I cannot subscribe to the majority's conclusion that the taking of a sample from the applicant for the purposes of analysing his DNA profile was not in accordance with the law on the grounds that the latter was not foreseeable.
It should be noted that the legislative provision in force at the relevant time – Article 131 §§ 2 and 3 of the Code of Criminal Procedure – provided for a blood sample to be taken or other medical procedures to be carried out, subject to judicial authorisation, if this was necessary for the establishment of facts of importance to a criminal investigation.
The legislation went further, providing for these measures to be applied forcibly if the person concerned failed to cooperate.

On the basis of this provision and the public prosecutor's request, the judge ordered a saliva sample, or alternatively a blood sample, to be taken from the applicant, by force if necessary. The applicant consented to a buccal swab in the presence of his lawyer.

The judge therefore acted in full compliance with the law, which in my view was perfectly clear and foreseeable. The law without doubt covered the taking of a sample of saliva for the purposes of DNA identification, which represents key evidence in criminal cases and an essential tool for investigators and investigating judges in establishing the truth. How can the words "other medical procedures" be construed not to encompass this type of evidence? It would have been possible, under the law, to just take a blood sample; this, like a buccal swab sample, would have enabled the applicant's DNA profile to be determined. But the judge prioritised the taking of a buccal swab sample, a method that was less invasive and less unpleasant for the applicant.

The words "other medical procedures" undoubtedly cover the taking of DNA samples. The only restriction on the medical procedures that may be ordered is that they must not cause harm to the health of the person concerned. It goes without saying that the taking of a sample is painless and has no health implications. It falls entirely within the scope of the law.

It is therefore clear that the impugned measure resulted from an order made by an inherently independent judge and did not cause any unpleasantness for the applicant. Lastly, it scarcely needs to be said that the results of the DNA test made it possible to quickly rule out evidence that could have implicated the applicant directly in a crime. The sample was taken on 30 July 2008 in response to an allegation that the applicant had been involved in the murder of an elderly man. By 11 September 2008 it had been established that there was no match between the applicant's DNA and the traces found at the scene.

Hence, the taking of a sample allowed evidence against the applicant to be definitively ruled out.

The new Code of Criminal Procedure makes express provision for a buccal swab sample to be taken without the consent of the person concerned. The conditions in which the sample was taken in the present case are thus also compatible with the new criminal-law rules.